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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHELLE HEIER, trustee of the MICHELLE ANNE HEIER FAMILY TRUST,	G054785
Plaintiff and Respondent,	(Super. Ct. No. 30-2015-00813381)
v.	O P I N I O N
THELMA BARNETT,	
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed as modified. Request for judicial notice denied.

Law Offices of Christopher K. Jafari, Christopher K. Jafari and Kiarash Kay Jafari for Defendant and Appellant.

Stuart Kane, Donald J. Hamman and Eve A. Brackmann for Plaintiff and Respondent.

* * *

Thelma Barnett appeals from a judgment quieting title to a piece of property held as security for a loan, in favor of Michelle Heier, as trustee of the Michelle Anne Heier Family Trust, and awarding damages to Heier for overpayment of that loan obligation. The parties' dispute over whether the loan had been fully paid, as Heier claimed, centered on: (1) whether Heier had been obligated to pay contractual fees and interest triggered by late or insufficient payments, in addition to the loan's regular principal and interest, and (2) whether all the claimed payments had actually been made or if some claimed payments had been falsified. The trial court resolved those issues in favor of Heier, concluding she had fully paid the loan in April 2011, and that she was entitled to be reimbursed $40,153 for the additional payments she had mistakenly made to Barnett through February 2012.

Barnett does not challenge the part of the judgment quieting title to the property in Heier's favor. She challenges only the damages portion of the judgment, arguing primarily that it must be reversed because Heier's claim for reimbursement of the loan overpayment was barred by both the applicable statute of limitations and the "voluntary payment doctrine." We agree Heier's overpayment claim is largely barred by the statute of limitations—with the exception of $10,000 Heier paid to Barnett in 2014—and we reverse the damages portion of the judgment on that basis. However, we reject Barnett's reliance on the voluntary payment doctrine as a separate justification for reversing Heier's damages award, and we conclude that Barnett's claim for offset, based upon the enforceability of late fees purportedly owed by Heier, is moot.

Barnett also contends the court erred in awarding attorney fees to Heier because the contractual fee provision relied upon in making the award was inapplicable to this dispute. We disagree. Barnett's obligation to reconvey the deed of trust on the

property securing the loan obligation is a statutory duty incorporated by law into the parties' written agreement, and thus Heier's successful cause of action for quiet title was an action on the contract pursuant to Civil Code section 1717.[1]

FACTS

Heier filed her complaint against Barnett in October 2015. She alleged that her late father had borrowed $240,076 from Barnett and the debt was secured by a trust deed on a commercial property. According to the verified complaint, the loan was allegedly paid off in April 2011, but Heier did not realize that was the case, and "inadvertently made payments through May 2014." Heier further alleged that "[e]ven though [she] paid and overpaid the loan and has now requested reconveyance and a

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[1] Heier has requested that we take judicial notice of two documents in support of her respondent's brief: (1) the "Orange County Clerk-Recorder's Online Grantor/Grantee Index search results for Thelma Barnett and Michelle Heier dated January 29, 2018," and (2) a "Minute Order dated May 3, 2012 in *RDI, Inc. v. Digital Spectrum Solutions, Inc., et al.*" a wholly unrelated case then pending in the Orange County Superior Court. We deny the request.

The first document is irrelevant to the issues before us, and is expressly offered for the sole purpose of informing this court that Barnett has not yet reconveyed clear title on the property subject to the quiet title action, and thus that she has "unclean hands." That fact has no bearing on the issues before us. We nonetheless note that Civil Code section 2941.5 states that "[e]very person who willfully violates [s]ection 2941 is guilty of a misdemeanor. . . ."

The second document is purportedly offered to demonstrate "the need for appellate guidance" on the key issue of which statute of limitations applies to Heier's unjust enrichment cause of action. Our responsibility is to rule on every issue presented to us, without regard to whether or how trial courts in other cases may have grappled with the issue in the past. It therefore appears Heier's real goal is to direct our attention to the existence of a lower court ruling that distinguishes the only published appellate case on point, in her favor, in the apparent hope it will persuade us to do the same. Citing a lower court opinion for that purpose is improper, as Heier does acknowledge—although at the same time she claims it is not "strictly" improper because California Rules of Court, rule 8.115(a) only regulates the citations of opinions "from the 'appellate division' of the Superior Court" but not the rulings from every other trial court. The assertion is not persuasive.

refund of the overpaid amounts, [Barnett] has failed and refused to comply, encumbering the property and unjustly enriching herself with the overpaid amounts."

Heier stated causes of action for: (1) quiet title; (2) nonperformance of a statutory duty on discharge of obligation; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) unjust enrichment; (6) common counts; (7) accounting; and (8) declaratory relief.

Barnett filed a verified answer to the complaint, denying the key allegations and asserting affirmative defenses stating the recovery of any alleged overpayment was barred by the statutes of limitations contained in Code of Civil Procedure sections 337, 338, subdivision (d), and 339.

In connection with the trial, the parties stipulated to the following facts which establish the basis for their dispute:

"On March 5, 1984, the subject property . . . was purchased by [Heier's] predecessor, her late father Theodore A. Heier.

"In conjunction with that purchase, Mr. Heier borrowed $275,000.00 from [Barnett] (and her late ex-husband) and gave [Barnett] a promissory note . . . , secured by a deed of trust recorded on October 17, 1984 . . . .

"The original note in the amount of $275,000.00, dated September 27th 1984, was modified September 23, 1999 by a Modification of Deed of Trust and Promissory Note Secured Thereby (the 'Modification'), with respect to certain provisions, and according to this instrument (at § 3), the remaining terms of the original Note and Deed of Trust remained 'unaffected, unchanged, and uni[m]paired by reason of the execution of this agreement.'

"The Modification reflects (at § 1) that as of the date it was signed the unpaid balance of principal on the loan then-due was $240,076.00 and interest was to accrue thereon at the rate of 10.00% per annum from October 12, 1999 forward, and that the other terms of the Note were to remain unchanged. [¶] . . . [¶]

"On June 7th 1995, [Heier's] late father entered into another agreement with [Barnett] for a total amount of $20,000. It was expressly stated in the agreement that this agreement was not to be confused with the original Note. There is a dispute as to whether payments were made on this note. [¶] . . .[¶]

"Under the terms of the Modification, the balance due was to be paid in monthly installments of at least $3,000 per month until October 12, 2005, at which time the entire principal balance due and any interest due thereon was to become immediately due and payable.

"Insufficient payments were made to pay off the balance by October 12, 2005.

"[Heier] did continue making monthly payments on the loan as agreed starting in December 2005, although [the parties dispute whether] all such payments were actually made or made timely [and whether] late fees and interest are owed due to late payments and insufficient payments.

"[Barnett] continues to fail and refuse to reconvey and deliver to [Heier] the Note and Deed of Trust. [¶] . . . [¶]

"As a result of the failure and refusal of Defendant to reconvey the Deed of Trust, Plaintiff has been unable to clear title to the Subject Property or market it for sale."

Both Heier and Barnett testified at trial, and they stipulated to a joint list of trial exhibits, which included not only the relevant contracts comprising the loan agreement, but also substantial correspondence between the parties concerning Heier's contention that the loan had been fully paid off in April 2011, and she had mistakenly continued making payments to Barnett for several months thereafter. For the most part, Barnett's response was to repeatedly ask for documentation of all payments and claim she did not have them, and to suggest that some of the payments Heier was relying on had never been made.

At the conclusion of trial, the court issued its statement of intended decision. The court listed each of Heier's eight causes of action, and stated whether relief was granted or denied on each theory, or if the cause of action was withdrawn or became moot. As pertinent here, the court granted Heier's claim for quiet title, and awarded statutory damages of $500 pursuant to Civil Code section 2941, subdivisions (b) and (c) for nonperformance of a statutory duty on discharge of a secured obligation. With respect to the alleged overpayment of the loan, the court denied Heier recovery on her two breach of contract theories, noting she failed to "specify which terms of the contract are violated" by Barnett's "continuing to accept payments and refusing to refund." However, the court granted Heier relief for overpayment of the loan on the theory of unjust enrichment.[2]

The court also addressed Barnett's statute of limitations defenses on the merits, finding she "did not meet her burden of proof on any of them."

The court declared Heier to be the prevailing party, but did not rule on whether she was entitled an award of attorney fees, stating instead that "[w]hether an award of fees is allowed can be determined on a noticed motion."

Heier subsequently filed both a motion for an award of prejudgment interest and a motion for an award of attorney fees. The trial court denied the motion for prejudgment interest, but granted the motion for attorney fees, awarding Heier $67,000.

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[2] On the remaining causes of action, the court (1) denied Heier relief on common counts, explaining she "doesn't specify which common count, asks for prejudgment interest at 10% from 10/9/12 but didn't argue for it in brief or at trial," (2) stated the accounting cause of action was withdrawn, and (3) stated the declaratory relief claim was moot.

DISCUSSION

1. *Statute of Limitations*

Barnett first argues that the award of damages to Heier for overpayment of the loan must be reversed because the claim was barred by the Code of Civil Procedure section 388, subdivision (d), which applies to a cause of action for unjust enrichment based on mistake. Heier responds by asserting Barnett waived that defense by failing to adequately plead or prove it. We cannot agree.

While Heier is correct that application of the statute of limitations "is a personal privilege which must be affirmatively invoked by appropriate proceedings in the lower court," (*Dicker v. Bisno* (1957) 155 Cal.App.2d. 554, 560), Barnett raised the issue by pleading three separate statute of limitation defenses, including the three year statute of limitations found in Code of Civil Procedure section 338, subdivision (d), in her answer. (*Minton v. Cavaney* (1961) 56 Cal.2d, 576, 581 [defendant "waived the defense of the statute of limitations by failing to plead that defense in the answer to the complaint or by specifying the statute of limitations as a ground of its general demurrer"].)

Heier also suggests Barnett's pleading of the statute of limitations was ineffective because she "did not allege as to which claim it might apply, merely alleging that 'Recovery of the alleged overpayment is barred by the 3 year from discovery statute of limitations under CCP 338(d),'" and because it was "hardly sufficient to put Ms. Heier on notice that [Barnett] planned to allege after trial, for the first time on appeal, that the three-year statute of limitations applies to a contract-based unjust enrichment claim." However, Barnett specifically alleged the statute of limitations applied to the "Third Through Seventh Causes of Action," and Heier cites no authority for her implicit claim that more specificity was required. As for Heier's second assertion, not only does she fail to cite any authority to support it, but it misstates Barnett's argument.

Similarly, Heier's assertion that a waiver of the defense is demonstrated by the fact Barnett did not mention the statute of limitations in her trial brief, and then addressed it only briefly in her closing argument at trial, is unsupported by authority.

Ultimately, however, Heier's waiver claim fails because the trial court implicitly found otherwise when it ruled on the merits of Barnett's statute of limitations defense, finding Barnett had failed to "meet her burden of proof" in establishing them. As we explain, that ruling was erroneous because the evidence demonstrates, as a matter of law, that Heier did not file her lawsuit seeking reimbursement of the loan overpayment within the applicable statute of limitations.

The trial court's award of overpayment damages to Heier was tied specifically to her cause of action for unjust enrichment. The court expressly denied recovery on Heier's causes of action for breach of contract, noting Heier had never identified any provisions of the contract that were violated by her mistaken overpayment or Barnett's failure to refund.

As stated in *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 348 (*Dintino*), "the section 338, subdivision (d), three-year statute of limitations applies to an unjust enrichment cause of action based on *mistake*." (See *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1670 ["'A quasi-contract action, in the form of a common count for money had and received, to recover money obtained by fraud (waiver of tort) or mistake, is governed by the fraud statute'"].)

Heier argues that *Dintino* is distinguishable because the underlying wrong in that case was a tort, whereas the dispute in this case arose out of a contractual relationship – and thus the reimbursement claim should be subject to the four-year statute of limitations applicable to "contract-based actions." The argument is not persuasive. *Dintino* also involved a lawsuit that arose out of a secured loan agreement. In that case, a bank mistakenly reconveyed an unpaid trust deed on the borrower's house, and the borrower promptly sold the house, kept all the proceeds, and stopped making payments

on the note. The bank sued, alleging breach of contract as well as unjust enrichment. The court concluded the bank could not prevail in an action based on breach of contract, not because the defendant's actions were not a breach of the loan agreement, but because the "one action rule"[3] barred that cause of action. (*Dintino, supra*, 167 Cal.App.4th at pp. 340.) However, the bank prevailed on its claim for repayment of the outstanding loan principal and interest, on a theory of unjust enrichment. (*Id.* at p. 342.)

On appeal, the *Dintino* borrower contended the trial court had erred by applying the four-year statute of limitations, for actions arising out of contract, rather than the three-year statute applicable to fraud or mistake, to the bank's claim for unjust enrichment. The appellate court agreed, explaining that "a cause of action for unjust enrichment is *not* based on, and does not otherwise arise out of, a written contract. Rather, unjust enrichment is a common law obligation implied by law based on the equities of a particular case and not on any contractual obligation. [Citation.] Whether termed unjust enrichment, quasi-contract, or quantum meruit, the equitable remedy of restitution when unjust enrichment has occurred 'is an *obligation* (not a true contract [citation]) created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money.'" (*Dintino, supra*, 167 Cal.App.4th at p. 346.) We agree. It does not matter whether or not the parties entered into a contractual relationship (as both the parties in *Dintino* and in this case did). In either case, the cause of action for unjust

[3] The "one action rule" is set forth in Code of Civil Procedure section 726, and provides that "[t]here can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter."

enrichment arises out of the common law obligation of the unjustly enriched party to return the thing that rightfully belongs to the aggrieved party.[4]

Heier also cites *H. Russel Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, for the proposition that the four-year statute of limitations would be applied to a common law assumpsit claim. However, the appellate court in that case explained in detail why the assumpsit claim asserted was based on an "*implied by* law contract of sale." (*Id.* at p. 719.) That reasoning has no application to this case.

We consequently conclude, as did the court in *Dintino*, that Code of Civil Procedure section 338, subdivision (b), the three-year statute of limitations for actions based on fraud or mistake, governs Heier's unjust enrichment claim. However, as *Dintino* also points out, the discovery rule would apply as well, and thus the three-year period would not commence running until Heier discovered, or had reason to discover, that cause of action. (*Dintino, supra*, 167 Cal.App.4th at p. 350.)

The discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 397; *Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 807.) A plaintiff "has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements," meaning he has """""notice or information of circumstances to put a reasonable person *on inquiry*."""""" *(Norgart v. Upjohn Co., supra,*

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[4] In arguing otherwise, Heier misconstrues *Dintino*. When the *Dintino* court states that "Bank's cause of action for unjust enrichment based on its mistaken request for recordation of the Reconveyance is not based on, and does not arise out of, a written contract (i.e., the Note), but rather is based on an obligation implied by law because of the equities in the circumstances of this case" (*Dintino, supra*, 167 Cal.App.4th at p. 347), the court is not distinguishing that case from other unjust enrichment cases that *are* based on a written contract. Rather, it is restating the blanket rule that unjust enrichment cases *do not* arise out of contract.

21 Cal.4th at p. 398.) Once a plaintiff has inquiry notice, the limitations period commences, and "within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place—he 'cannot wait for' them 'to find' him and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does." (*Ibid.*, fn. omitted.)

The delayed discovery rule requires this plaintiff to plead facts showing "(1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." (*Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at p. 808.) Thus, it is Heier's burden to demonstrate she would have been unable to discover her cause of action earlier despite reasonable diligence, rather than Barnett's burden to disprove that. "The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have '"'information of circumstances to put [them] *on inquiry*'"' or if they have '"'*the opportunity to obtain knowledge* from sources open to [their] investigation.'"'" (*Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at pp. 807-808, fn. omitted.)

In this case, the evidence is irrefutable that Heier was fully aware of her cause of action for unjust enrichment more than three years before she filed her lawsuit in October 2015. In February of 2012, Heier sent a letter to Barnett, informing her that "[i]n preparing for our 2011 taxes we have come to realize that we have paid off the balance owed on the purchase of the property . . . . Our records indicate that the balance would have been paid in full in October of 2011." In May 2012, Barnett sent a letter to Heier requesting that she "get copies of the missing checks from the bank . . . because it's the only way to make sure all the payments have been made." In July 2012, Heier wrote to Barnett's CPA, who was handling the matter for Barnett. She mentioned she had "submitted the documents that [Barnett] requested." On August 12, 2012, Barnett wrote to Heier's husband claiming she still did not have all the payment documentation, implying she was willing to issue a reconveyance of the deed of trust once she got them.

Finally, on August 25, 2012, Heier wrote to Barnett again, telling her she had provided all the payment documentation she could, and had "done everything possible to make this as simple for you as [she] could." She then reiterated her claim that the loan had been fully paid months before she ceased her payments to Barnett, while asserting the full payment date was "April of 2011"—the exact claim she made in her lawsuit and which was found to be true at trial. Heier stated she was entitled to a refund for her loan overpayment in the specific amount of $31,223.68.

This series of correspondence demonstrates, as a matter of law, that Heier not only "ha[d] reason at least to suspect a factual basis" for her unjust enrichment claim by August 25, 2012 (*Norgart v. Upjohn Co., supra*, 21 Cal.4th at p. 398), but also that she had already performed an accounting that nailed down the date on which the loan had been fully paid and determined the exact amount by which she had overpaid it. Consequently, Heier was, at a minimum, obligated to file her lawsuit within three years of that date. She failed to do that, however, and consequently, her claim for unjust enrichment based upon her 2011-2012 loan overpayments was barred by the statute of limitations. The trial court erred in concluding otherwise.

We cannot accept Heier's contention that the statute of limitations should have been equitably tolled, or that Barnett should be estopped from relying on it, because she fraudulently induced Heier to hold off on filing her lawsuit. Neither of those factually intensive assertions was raised in the court below, and thus they are waived. "It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal." (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.) There is a limited exception to this waiver rule, but it applies only to purely legal questions that rest on an uncontroverted record that could not have been altered by the presentation of additional evidence. (*Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1299, fn. 3 ["A party may raise a purely legal issue for the first time on appeal"].)

In any event, these assertions, as outlined in Heier's brief, are not persuasive. An estoppel to assert the statute of limitations requires a finding that "the defendant's conduct, relied on by the plaintiff, has induced the plaintiff to postpone filing the action until after the statute has run." (*Mills v. Forestex Co*. (2003) 108 Cal.App.4th 625, 652.) The plaintiff must be "ignorant of the true state of facts." (*Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 767.) Heier first claims she was induced to delay because Barnett refused to sign a reconveyance "on the false premise that certain payments had not ever been made." But as we have already pointed out, Barnett began engaging in what was apparently a delaying tactic immediately after Heier contacted her about the overpayment in February 2012. Even if that might have justified some delay on Heier's part, it did not justify Heier's continuing inaction several years later, after she had repeatedly provided Barnett with her documentation.

Similarly, the fact that Barnett later came up with various counter assertions about the amounts due under the amended loan documents, or the possible application of late fees, all of which allegedly left Heier "still unsure of whether there were additional amounts due" in 2015, would not justify her failure to pursue a lawsuit. The existence of factual and legal disputes between parties is the reason lawsuits are filed, not a justification for a delay in bringing one. By 2015, it should have been clear that Barnett would not voluntarily agree to reimburse the funds Heier had overpaid years before. Consequently, Heier cannot justify any further delay in filing her lawsuit by claiming she was misled into believing it would not be necessary to do so.

As for equitable tolling, it applies "'[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.'" (*Elkins v. Derby* (1974) 12 Cal.3d 410, 414) In that situation, the statute of limitations for the other remedies would be tolled during the pendency of the one first pursued. Thus, the purpose of such tolling is to ease the pressure on parties to "concurrently . . . seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue." (*Olson v.*

County of Sacramento (1974) 38 Cal.App.3d 958, 965.) That doctrine does not apply here.

Finally, Heier asserts that the statute of limitations cannot have expired on her unjust enrichment claim related to the $10,000 she was induced to pay to Barnett in May 2014—less than a year and a half before she filed her lawsuit. We agree. However dilatory Heier may have been in seeking reimbursement of her earlier overpayments, her mistaken payment of $10,000 in May 2014 fell well within the statute of limitations. Consequently, we will remand the case to the trial court with an order to modify the damages amount to $10,000, retroactive to the date of the initial judgment.

2. *Voluntary Payment Doctrine*

Having concluded that $10,000 of Heier's unjust enrichment claim was not barred by the applicable statute of limitations, we must address Barnett's alternative contention that Heier's claim for reimbursement was barred by the voluntary payment doctrine. The doctrine provides that "a payment voluntarily made with knowledge of the facts affords no ground for an action to recover it back." (*American Oil Service v. Hope Oil Co.* (1961) 194 Cal.App.2d 581, 586.) To state the rule is to distinguish it in this case. Heier made all of her payments in the mistaken belief that Barnett was entitled to payment, not because she was voluntarily making a gift of funds she understood were not owed.

In arguing to the contrary, Barnett relies on facts suggesting that because Heier was an experienced bookkeeper, she *should have known* the accurate status of loan payments at the time she made all such payments. The assertion borders on the specious. Heier made no payments to Barnett at a time when she had actual "knowledge" that no payment was due.[5]

[5] Barnett's final argument is that the trial court erred by refusing to credit her with the $18,120 in late fees she believes Heier owed to her under the terms of their loan agreement, and which should have been used to offset any liability she had for Heier's

3. *Attorney Fees*

Barnett also contends the court erred in awarding contractual attorney fees to Heier because the only contractual fee provision, contained in an installment note, is narrowly drawn, applying only to "suit[s] . . . commenced to collect this note or any portion thereof." She also contends it is inapplicable because Heier is not a signatory to that installment note.

Neither contention is persuasive. We reject the second assertion, as both the installment note and the deed of trust specify they are applicable to not only the original obligor, who is Heier's father, but also to his successors in interest.

As for the first, the parties' written agreement is embodied in three documents: (1) the original installment note, dated September 27, 1982; (2) the Deed of Trust securing the installment note, entered into on the same date; and (3) the Modification of Deed of Trust and Promissory Note Secured Thereby (the modification agreement), dated September 23, 1999.

The installment note and deed of trust constituted a single contract when entered into. (Civ. Code, § 1642; *Nevin v. Salk* (1975) 45 Cal.App.3d 331, 338 ["Under section 1642 of the Civil Code, it is the general rule that several papers relating to the same subject matter and executed as parts of substantially one transaction, are to be construed together as one contract"]; *Huckell v. Matranga* (1979) 99 Cal.App.3d 471, 481.) And the modification agreement reflects on its face that it was intended to amend certain provisions of the note and deed of trust, while expressly preserving all unamended provisions of both documents—which would include the attorney fee provision contained in the note—and reaffirming the parties' obligations thereunder.

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overpayment of the loan. However, because we are reversing the judgment with respect to Heier's recovery of approximately $31,000 of her overpaid loan amount—far more than would have been offset by Barnett's entire claim for late fees—the assertion is moot.

Moreover, because "'"'all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated'"'" (*City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 378), the note and deed of trust must be construed as incorporating any statutory requirements then in existence which governed such instruments. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489-1490 ["The deed of trust thus required that any tax services fee Washington Mutual charged plaintiffs comport with [statutes]. [Citation.] Plaintiffs alleged that the fee violated [those statutes]. They therefore stated a cause of action for breach of contract"].)

Although the fee provision in the installment note is narrowly drawn, Civil Code, subdivision (a), expands the stated scope of a contractual attorney fee provision in two ways. First, it specifies that an attorney fee provision that applies on its face to only one party, must be applied equally to both parties: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).)

And second, it specifies that with a limited exception, a fee provision that applies on its face to only part of a contract must be construed as applying to the entire contract: "[w]here a contract provides for attorney's fees, . . . that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." (Civ. Code, § 1717, subd. (a); *R.W.L. Enterprises v. Oldcastle, Inc.* (2017) 17 Cal.App.5th 1019, 1027 ["[T]o the extent the attorney fee provision in the 2010 credit application applies, it applies to both parties and to their entire contract"].)

In this case, the installment note does not reflect that any party was represented by counsel. Thus, the fee provision in the installment note would apply not only to a lawsuit commenced by Barnett to collect on the note, but to any suit brought by either side to enforce any provision of the note or deed of trust, as modified, including statutory provisions incorporated therein by operation of law.

Significantly, in 1986, when Barnett and Heier's father entered into the installment note and deed of trust, Civil Code section 2941, subdivision (b), specified in pertinent part that "When the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall execute and deliver to the trustee the original note and deed of trust and a request for a full reconveyance to be executed by the trustee." (Former Civ. Code, § 2941, subd. (b), as amended by Stats. 1978, ch. 509, § 1, p. 1657.)[6] That statutory obligation must be treated as a term of the deed of trust and, thus, part of the parties' integrated contract.

And because it was Barnett's breach of her contractual obligation to reconvey the deed of trust which gave rise to Heier's successful cause of action for quiet title, that cause of action qualified as an "action on a contract" for purposes of Civil Code section 1717. It is immaterial that the cause of action was not technically pleaded as a cause of action for breach of contract.

"In determining whether an action is 'on the contract' under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347 (*Kachlon*); see *Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979 ["California courts construe the term 'on a contract' liberally"].) "An action (or cause of action) is 'on a contract' for purposes of section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense

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[6] Civil Code section 2941, subdivision (b)(1), continues in effect, but now specifies that the beneficiary's obligation must be fulfilled "[w]ithin 30 calendar days."

that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause." (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 241-242.)

Thus, in *Kachlon*, the appellate court concluded, in similar circumstances, that a lawsuit seeking declaratory relief and to quiet title was an action on the contract for purposes of making an award of attorney fees. "[T]he basis of the Markowitzes' claim for an injunction was, in part, contractual in nature: namely, that foreclosure violated the terms of the trust deed. The quiet title claim, too, sought to enforce the terms of the deed of trust requiring a reconveyance of title upon satisfaction of the underlying debt" (*Kachlon, supra*, 168 Cal.App.4th at p. 348.)

Barnett's attempt to distinguish *Kachlon* founders on the second aspect of section 1717. She contends that although the attorney fee provision in the *Kachlon* promissory note is broadly worded—applying to any action "instituted on the promissory note" (*Kachlon, supra*, 168 Cal.App.4th at p. 347)—the fee provision in the note before us applies only "in connection with defaults by the obligee in payments on the note." However, as we have already explained, even if the note here expressly limits the attorney fee provision to a particular type of claim brought pursuant to the contract, Civil Code section 1717 requires that provision to be construed as applying to any action instituted on the note or deed of trust—as was the case in *Kachlon.*

Barnett also argues that even if the attorney fees were properly awarded to Heier, the court erred by considering the portion of Heier's fee claim that was raised for the first time in her reply brief "only . . . days before the hearing on the motion." We disagree. As Heier explains, the additional fees were in no way a new or different fee claim than the one Heier had already made. Rather, the additional fees requested in Heier's reply brief reflected an updated total of the fees she had incurred in the action—

i.e., additional fees she had incurred since the filing of her motion, as a consequence of having to reply to Barnett's opposition.

If, as Barnett's argument impliedly suggests, a litigant could not recover the fees incurred in replying to the opposition on a fee motion, without filing a new noticed motion seeking to recover those reply fees, the process would devolve into an endless cycle. That is not the law, and we reject the contention.

Based on the foregoing, we find no error in the trial court's award of fees to Heier as prevailing party.

DISPOSITION

The judgment is modified to reflect Heier is entitled to $10,000 in damages for unjust enrichment, and that modification is retroactive to the date of the original judgment for purposes of calculating post-judgment interest. In all other respects, the judgment is affirmed. Heier is to recover her costs on appeal.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.